No. 88-5

IN THE

Supreme Court of the United States

October Term, 1988

* * * * *

GERARD W. McCALL,
Petitioner,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

* * * * *

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AMERICAN DIABETES ASSOCIATION, EPILEPSY FOUNDATION OF AMERICA, MICHIGAN PROTECTION & ADVOCACY SERVICE, NATIONAL ASSOCIATION OF PROTECTION & ADVOCACY SYSTEMS, ASSOCIATION FOR CHILDREN & ADULTS WITH LEARNING DISABILITIES, NATIONAL MULTIPLE SCLEROSIS SOCIETY, PARALYZED VETERANS OF AMERICA, WORLD INSTITUTE ON DISABILITY, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, NATIONAL SPINAL CORD INJURY ASSOCIATION

* * * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

GERARD W. McCALL,

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

NOW COME American Diabetes Association, Epilepsy Foundation of America, National Multiple Sclerosis Society, Michigan Protection and Advocacy Service, National Association of Protection and Advocacy Systems, Association for Children and Adults with Learning Disabilities, Paralyzed Veterans of America, World Institute of Disability, Disability Rights Education and Defense Fund, and National Spinal Cord Injury Association, and move this Court for leave to file a brief of Amici Curiae in the above-captioned case and in the support of this Motion say as follows:

1. The movants are organizations which have a significant interest in civil rights protection for persons with disabilities in employment and other areas.

2. The Petition for Writ of Certiorari before this Court raises significant issues regarding the

availability of State law protections against discrimination for persons with disabilities who are under collective bargaining agreements.

3. The movants, for reasons set forth in the proposed Brief of Amici Curiae, believe the Sixth Circuit's decision--which results in partial invalidation of State Civil Rights Law--is based on reasoning which is inconsistent with decisions of this Court and of other federal circuit courts of appeal.

4. The consent of the Respondent to file a brief of Amici Curiae has been sought and denied.

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Dated: July 28, 1988

IN THE

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October Term, 1988

No. 88-5

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Petitioner,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICI CURIAE AMERICAN DIABETES ASSOCIATION, EPILEPSY FOUNDATION OF AMERICA, MICHIGAN PROTECTION & ADVOCACY SERVICE, NATIONAL ASSOCIATION OF PROTECTION & ADVOCACY SYSTEMS, ASSOCIATION FOR CHILDREN & ADULTS WITH LEARNING DISABILITIES, NATIONAL MULTIPLE SCLEROSIS SOCIETY, PARALYZED VETERANS OF AMERICA, WORLD INSTITUTE ON DISABILITY, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, NATIONAL SPINAL CORD INJURY ASSOCIATION

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INTERESTS OF AMICI CURIAE

Amici curiae are ten organizations representing persons with a variety of disabilities and their families, advocates, and professionals, who are concerned that all persons with handicaps be afforded a full opportunity to participate in the work force. For many years, persons with disabilities have been unfairly denied the right to obtain employment due to misunderstanding, ignorance, and fear about their conditions and not because of inability to perform the work in question.

Amici are directly familiar with the devastating effect on persons with disabilities and their families which result from unfair denials of employment. Such denials waste valuable human talent, impede the achievement of independent living, and in many cases burden society with unnecessary expenses.

Amici have a strong interest in the outcome of this case. Amici are specifically concerned that persons who face handicap discrimination in industries subject to the Railway Labor Act--as well as industries subject to other federal labor statutes--be afforded the same range of state law remedies available to persons who face race and sex discrimination based upon their handicap.

Amici consist of:

The American Diabetes Association (ADA) has over 800 chapters and affiliates and more than 225,000 members nationwide, including physicians, research scientists, nurses, dieticians, educators, and consumers. ADA's purpose is to promote research and to improve the well-being of people with diabetes and their families. Despite the fact that more than eleven million Americans have diabetes, the condition is widely misunderstood. Inaccurate perceptions of diabetes and unfounded fears and stereotypes concerning its manifestations often give rise to employment discrimination.

The Association for Children and Adults with Learning Disabilities (ACLD) is an organization whose membership totals over 60,000 parents, professionals, and other concerned citizens dedicated to advancing opportunities for those with specific learning disabilities. It is estimated that five to ten percent of the population is affected by learning disabilities. Because specific learning disabilities are lifelong conditions, ACLD is committed to ensuring equal access to employment for persons with learning disabilities.

The Epilepsy Foundation of America is a national voluntary health agency founded in 1968 to advance the interests of the over two million Americans with epilepsy through research, vocational programs, public information and education, professional awareness, and advocacy. The term "epilepsy" evokes stereotypic images and fears which affect

persons with this medical condition in all aspects of life, especially employment. Since its inception, the Epilepsy Foundation of America has stood against the stigma and estrangement associated with epilepsy, and has supported the development of laws which protect individuals from discrimination based on stereotype and fear.

The Michigan Protection and Advocacy Service (MPAS) is a private non-profit corporation designated by the Governor of Michigan pursuant to the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. § 6001 *et seq.*) and the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (42 U.S.C. § 10801 *et seq.*) to protect and advocate for individuals with developmental disabilities and/or mental illnesses. Pursuant to this mandate, MPAS pursues a wide variety of legal and administrative remedies on behalf of persons with developmental disabilities and mental illnesses, including representation in employment discrimination cases.

The National Multiple Sclerosis Society (NMSS) is a non-profit organization which is comprised of 97 chapters with more than 400,000 members nationwide. Since it was organized in 1946, NMSS has been dedicated to promoting the cure, treatment, and prevention of multiple sclerosis (MS) and to improving the quality of life and enhancing independence for persons with MS. MS is a highly unpredictable and variable neurological disease that can result in a variety of

disabling conditions. NMSS has a long-standing interest in overcoming discrimination and prejudice that prevents people with MS and other disabilities from maintaining employment and other normal life functions that they are capable of performing despite their disabilities.

The National Association of Protection & Advocacy Systems represents Protection and Advocacy systems established pursuant to Section 113 of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6042, and Public Law 99-319, the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 USC 10801 *et seq.* These agencies have the statutory mandate to advocate for the rights of persons identified as develop mentally disabled or mentally ill. As part of this mandate, Protection and Advocacy agencies nationwide represent people with disabilities in employment-related matters, including discrimination.

Paralyzed Veterans of America (PVA) is a federally-chartered non-profit corporation and national membership organization comprised of veterans of the U.S. Armed Forces who have suffered spinal cord injury or dysfunction, either service-connected or non-service-connected in origin. PVA has 31 chapters and 15 subchapters located throughout the nation and represents over 14,000 members. Among the goals of PVA is the elimination of barriers which restrict the ability of mobility-impaired persons to participate in or receive the benefit of employment, transportation, educa-

tion, and cultural activities.

The World Institute on Disability is a private non-profit 501(c)-(3) corporation focusing on major policy issues from the perspective of persons with disabilities. It functions as a research center and as a resource for information, training, public education, and technical assistance for persons with disabilities. One of the goals of the Institute is to ensure that persons with disabilities are protected from discrimination based on their disability in all aspects of life, including employment.

The Disability Rights Education and Defense Fund (DREDF) is a national civil rights organization dedicated to securing equal citizenship for disabled Americans. DREDF pursues its mission through education, advocacy, and litigation. DREDF has participated in other major civil rights cases before this Court either as co-counsel or as amicus, including *Consolidated Rail Corp. v. Darrone,* 465 U.S. 624 (1984). DREDF views employment as a key to the independence of disabled persons and federal and state civil rights laws as central to ensuring equal employment opportunity.

The National Spinal Cord Injury Association (NSCIA) is a national non-profit organization representing the interests of the more than 500,000 Americans who are paralyzed as a result of spinal cord injuries and diseases. Established in 1948, the NSCIA has 72 chapters nation-wide, and 30 chapters in development. Through such chapters and its na-

tional organization, the NSCIA promotes prevention programs, services, and research. The NSCIA is interested in advancing the maximum utilization of the talents and skills of persons with spinal cord injuries, thereby ensuring the highest possible quality of life for such individuals.

SUMMARY OF ARGUMENT

For a significant number of persons, the Sixth Circuit's decision invalidates State statutory expression of public policy with respect to the integration of persons with disabilities into the labor force. This invalidation results from a process of reasoning which is inconsistent with the decisions reached and rationales employed by this Court and by other federal circuits in resolving issues of federal labor law preemption. Amici contend that in light of the problematic analysis of the Sixth Circuit, the "obvious importance of even partial invalidation of a state law designed to prevent the discriminatory denial of job opportunities" merits the attention of this Court. *Colorado Anti-Discrimination Commission v. Continental Airlines,* 372 U.S. 714, 717 (1963).

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE SIXTH CIRCUIT'S DECISION RESULTS IN THE PARTIAL INVALIDATION OF STATE STATUTORY PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION AND SUCH STATE PROTECTIONS CONSTITUTE IMPORTANT VEHICLES IN ADVANCING THE PUBLIC POLICY OF ERADICATING DISCRIMINATION ON THE BASIS OF HANDICAP.

In recent years, forty-nine State have enacted statutory protections for persons with disabilities with respect to discrimination in employment and other arenas of social interaction. 45A Am.Jur.2d § 124, pp.176-77. The Michigan Handicappers' Civil Rights Act--enacted to ensure the employment of persons with handicaps to the "maximum practicable extent"--is an important part of the scheme of State protection. *Wardlow v. Great Lakes Express Co.*, 128 Mich. App. 54, 339 N.W.2d 670, 674 (Mich.Ct.App., 1983). The Sixth Circuit's decision potentially bars thousands of workers under collective bargaining agreements from asserting rights established by State anti-discrimination laws. Because of the State's strong role in advancing the policy of non-discrimination, the invalidation by the Sixth Circuit of such protection for a significant number of persons deserves scrutiny by this Court.

These State enactments are landmarks in a process of momentous change in public policy regarding persons with disa-

bilities, an evolution from isolation to integration. In the past, persons with disabilities such as mental retardation, mental illness, and epilepsy have been subjected to exclusionary immigration policies, sweeping institutionalization, and compulsory sterilization under statutes premised on the "science" of eugenics and fears of a contagion of "defective" traits in society. President's Commission on Employment of the Handicapped, "Disabled Americans: A History," 27 Performance 1, No. 5-7 (Nov.-Dec. 1976, Jan. 1977). Additionally, children with disabilities have until recent times been excluded from the public school system or simply "warehoused" in segregated classes. *Honig v. Doe*, ____ U.S. ____ (1988). Such practices have left a legacy of ingrained attitudinal prejudices against handicapped individuals, a legacy which anti-discrimination laws have been designed to help eradicate.

As this Court has found, Congress, in enacting Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, has "acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Arline v. School Board of Nassau County*, ____ U.S. ____, 107 S.C.T. 1123, 1129 (1987). In amending the statutory definition of "handicapped individual" to include persons who are regarded as having a handicap, Congress was concerned "with protecting the handicapped against discrimination stemming not only

from simple prejudice, but from 'archaic attitudes and laws.'" *Id.* at 1126 (quoting S.Rep.No. 93-1297 (1974)).

The Michigan Handicappers' Civil Rights Act (MHCRA), MCL 37.1101 *et seq.*, similarly recognized the imperative of eradicating attitudinal bias and general exclusionary practices affecting persons with disabilities. According to the legislative history of the MHCRA:

> Michigan law offers protection in most situations from discrimination based on race, color, religion, national, origin, and sex, and in some situations from discrimination based on age and marital status, [but] existing law offers handicappers (sic, less?) than for others. Traditional attitudes often work against handicapperseven though they are perfectly capable of performing the jobs for which they apply.

Carr v. General Motors Corp., 425 Mich. 313, 389 N.W.2d 686, 688 (Mich. S. Ct., 1986) quoting House Analysis, S.B. 749, July 27, 1976.

Clearly, the MHCRA does not countenance generalized assumptions or policies regarding the ability of persons with handicaps. The need for statutory prohibitions against such generalized assumptions and exclusions is compelling in light of the status of handicapped persons in the labor force.

Statistical studies have shown that unemployment rates

among handicapped persons are drastically higher than rates of unemployment for non-handicapped persons. Wolfe, "How the Disabled Fare in the Labor Market," 103 Monthly Lab. Rev. 50-51 (1980). Only a small percentage of handicapped Americans who could work if given the opportunity are actually employed. Note, "Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled," 61 Geo. L.J. 1512 (1973). In 1983, unemployment rates among handicapped workers were estimated to be between 50 and 75 percent. U.S. Commission of Civil Rights, "Accommodating the Spectrum of Individual Abilities," 81 Clearinghouse Publ. 29 (Sept., 1983). Significantly, only a small percentage of cases is inability to perform a regular, full-time job the reason a handicapped person is not employed. *Id.* Frequently, employer prejudices exclude handicapped persons from jobs. Biases operate subtly, sometimes unconsciously, to eliminate handicapped job applicants in the application, screening, testing, interviewing and medical examination processes:

> Often, the employer makes erroneous assumptions regarding the effect of a person's disability on his or her ability to perform on the job. In most cases the disabled person is never given an opportunity to disprove those assumptions; in some cases, the disabled person never knows why he or she didn't get the job.

Kaplan, "Employment Rights: History, Trends and Status," 2 Law Reform in Disability Rights E-4 (1981).

It is against this background that the rights of persons with disabilities to secure the protections of State civil rights laws must be addressed.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION OF THE SIXTH CIRCUIT IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The right of handicapped persons who work under collective bargaining agreements to access courts to enforce State civil rights statutes is grounded in prior decisions of this Court and other federal courts of appeal. Although these decisions have often been reached in cases arising under more prevalent labor legislation, these decisions are of assistance in construing the Railway Labor Act (RLA). *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

Clearly, the RLA itself contains no indication of intent to preempt State Anti-Discrimination laws. *Colorado Anti-Discrimination Commission v. Continental Airlines*, 372 U.S. 714 (1963). The Sixth Circuit distinguishes *Colorado Anti-discrimination* on the grounds that the State handicap discrimination claim involved the same inquiry as the arbitration process: the worker's ability to perform the particular job. Because the same factual inquiry was involved in the two proceedings, the Sixth Circuit reasons, the purposes of labor arbitration would be undermined by allowing the jury the opportunity to "second-guess" the findings of the arbitral panel.

Yet in cases arising under the Labor Management Relations Act, this Court has stated that the mere existence of the same matrix of facts in the two proceedings is insufficient to man-

date preemption; rather, an independent State law claim is preempted only if its resolution requires the interpretation of the collective bargaining agreement. *Lingle v. Norge Division of Magic Chef, Inc.*, ____ U.S. ____ (1988). See also *Leu v. Norfolk and Western Railway Co.*, 820 F.2d 825 (7th Cir., 1987) (State tort of conversion preempted by RLA because of existence of alleged duty to pay medical expenses dependent upon terms of the labor contract). In *Lingle* and other decisions, this Court has recognized that consideration of potential or actual interference with the arbitration process must yield to "different considerations... where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine v. Arkansas-Best Freight System Inc.*, 450 US 728, 737 (1981). *Atchison, Topeka and S. F. Ry. v. Buell*, ____ U.S. ____, 107 S.Ct. 1410 (1987). See also *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290 (1970). The approach adopted by this Court in *Lingle* successfully reconciles the need to ensure uniform treatment of labor disputes within the scope of collective bargaining agreements while protecting the integrity of independent substantive rights for individual employees. The approach adopted by the Sixth Circuit, in contrast, effectively overrules civil rights protections applied to handicapped workers under collective bargaining agreements.

Such a result might be tolerable if the RLA or the contract entered into under its authority established a substantive standard by which the judge employment claims. Not only is this not the case, but the procedure which the Sixth Circuit's decision relegates the employee is systematically incapable of making the mixed inquiries of law and fact required by State anti-discrimination laws. As this Court has stated, the "specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). Although the arbitrator may be competent to decide factual issues such as whether the employee utilized insulin to control his diabetes and whether the company policy excluded such individuals, the arbitrator lacks the competence to determine the legal issues implicated by these circumstances, issues regarding the employee's rights to be free from discriminatory actions and policies. See *Barrentine* at 743. Contrary to the Sixth Circuit, such considerations do not apply only when two federal statutes are involved. *Lingle, supra.*

It is precisely the absence of a substantive standard under the RLA and the labor contract that authorized the separate State inquiry and brings this case within the rationale of *Lingle.* In the present case, the State law has established criteria for deciding this case which enables State law to be applied without reference to the collective bargaining agreement. The issue of the employee's ability to perform the du-

ties of the job does not involve interpretation of standards set out in the collective bargaining agreement. Because substantive rights under the contract are not implicated, there is no danger of interference with the federal scheme of labor dispute resolution. As the Ninth Circuit--in holding that Oregon's handicap discrimination statute is not preempted by the Labor Management Relations Act--has stated, "[i]f a court can uphold state rights without interpreting the terms of a CBA, allowing suit based on the state rights does not undermine the purpose of Section 301 preemption: guaranteeing uniform interpretation of terms in collective bargaining agreements." *Miller v. A.T. & T. Network Systems*, ____ F.2d ____ (9th Cir., 1988).

To the extent that certain frustration does occur, such a concern is strongly mitigated by the fact that the decision of the arbitral board was admitted into evidence in the State law proceeding. See *Alexander* at 60. Given the critical importance of the non-negotiable and independent substantive rights established under civil rights statutes, such minimal frustration is tolerable. State anti-discrimination laws are simply too important and substantial to be, in effect, consumed by arbitration proceedings. This is true with regard to discrimination claims based on race, sex, age, or handicap. If an Asian-American was disqualified by a company height requirement, would an arbitration decision upholding this policy preempt the individual's right to proceed under state anti-discrimination laws? Similarly, if a woman was

disqualified by a minimum weight-lifting requirement, would her state law claim be precluded? Amici respectfully suggest that such questions answer themselves, and the Sixth Circuit's decision contains no principled basis for distinguishing such cases from instances where a person's handicapping condition is utilized as a proxy for individual ability. Such a person, no less than others, has the right to access the remedial avenues established by civil rights law, avenues which are capable of accommodating the broad and subtle inquiries required by the standards of public law.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: July 28, 1988